

FILED

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CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

BY: gnz

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Donovan Foster, Pro Per, Plaintiff,
v.
United States of America, Defendant.

Case No. 2:22-cv-08522-FWS-PVC

**Plaintiff's Opposition to Motion to Dismiss First
Amended Complaint**

COMES NOW the plaintiff, Donovan Foster, who respectfully submits this Opposition to the Defendant's Motion to Dismiss First Amended Complaint, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The plaintiff opposes the defendant's motion and respectfully requests that this honorable court denies the motion and allows this case to proceed.

I. INTRODUCTION

This is a civil action brought by the plaintiff against the defendant in relation to the Defendant losing the plaintiff's service department records which included service treatment records which the Defendant had a duty to ensure where available for review, production, and/or reproduction per the Federal Records Act of 1950. To be abundantly clear to the court this civil action does not have anything to do with the denial of the Plaintiff's 2009 application for VA benefits or any action the Secretary took or did not take in any regard. This civil action is based on alleged negligence, medical malpractice and/or medical negligence, and other tortious acts unrelated to the administration of benefits.

The Defendant purposefully is attempting to inaccurately characterize this civil action to evade justice and the remedy that the FTCA provides to victims of negligence; like the Plaintiff. The plaintiff seeks redress for negligence, medical malpractice, and other tortious conduct cognizable under the FTCA on the part of the defendant.

II. FACTUAL BACKGROUND

1 Plaintiff is a Honorable United States Armed Forces
2 Veteran.

3
4 Defendant admitted for the first time November 25, 2019,
5 that they lost or mislabeled the Plaintiff's service
6 department records to included service treatment records.

7 8 **III. ARGUMENT**

9 10 **A. Plaintiff's Exclusive Remedy Is Through the FTCA.**

11
12 The defendant contends that the plaintiff's exclusive
13 remedy for the denial of his 2009 application for VA
14 benefits is through the Veterans Judicial Review Act
15 (VJRA) and not the Federal Tort Claims Act (FTCA).
16 However, this civil action has nothing to do with the
17 Defendants denial of the Plaintiff's 2009 application for
18 VA benefits. Furthermore in the Standard Form 95
19 initiating the Plaintiff's claim administratively attached
20 Exhibit C Plaintiff never mentions the defendant's denial
21 of the 2009 application when listing the "Basis Of
22 Claim". While the Plaintiff during negotiations prior to
23 this civil action in a hopes to provide a wide view of the
24 harms caused by the Defendant's actions does state in the
25 Demand Letter that accompanied Standard Form 95 the
26 following: "The denial of the claim decision dated May
27 14, 2010 precluded me from receiving needed mental
28 health treatment from Department of Veterans Affairs

1 facilities. In addition, the unavailability of my service
2 department records and or service treatment records
3 precluded me from receiving timely and effective
4 treatment for my diagnosed Bipolar II Disorder with
5 Anxious Distress and Post Traumatic Stress Disorder.”
6 however that is not the only harm caused by the
7 Defendant’s tortious conduct and is not the basis of this
8 claim or this subsequent lawsuit as evident by Standard
9 Form 95.

10
11 It is essential to clarify that the Plaintiff’s claims are not
12 within the exclusive jurisdiction of the Court of Appeals
13 for Veterans’ Claims (CAVC) as per 38 U.S.C. §§ 511(a)
14 and 7104(a). The VJRA primarily concerns benefit
15 determinations and does not cover the alleged negligence
16 and other wrongful acts attributed to the Defendant in this
17 case.

18
19 The Defendant is attempting to evade the not only justice
20 but jurisdiction of this court and the exclusive remedy
21 established by Congress under the FTCA available to the
22 court for the Plaintiff for the negligent acts committed by
23 the Defendant.

24
25 Furthermore 38 U.S.C.S. § 7316 makes clear that, at a
26 minimum, a plaintiff may bring medical malpractice and
27 negligence claims against a "health care employee" of the
28 VA under the Federal Tort Claims Act (FTCA), 28

1 U.S.C.S. § 1346. Said otherwise, when a plaintiff brings
2 an action against a VA health care employee (meaning the
3 professionals and related support staff listed in 38
4 U.S.C.S. § 7316(a)(2)) alleging injury from a negligent
5 medical decision, the action may proceed under the FTCA
6 and is not barred by the Veterans' Judicial Review Act
7 (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988).
8 Given that the FTCA provides the exclusive means for
9 resolving such claims, district courts have jurisdiction to
10 hear them.

11
12
13 Notwithstanding the expansive scope of § 511's
14 preclusion of judicial review, VCS acknowledged that
15 District Courts continue to have jurisdiction to hear some
16 claims brought by individual veterans under the FTCA.
17 The FTCA gives district courts "exclusive jurisdiction of
18 civil actions on claims against the United States, for
19 money damages, . . . for injury or loss of property, or
20 personal injury or death caused by the negligent or
21 wrongful act or omission of any employee of the
22 Government while acting within the scope of his office or
23 employment." 28 U.S.C. § 1346(b)(1). It is noted in VCS
24 that we had previously considered a veteran's FTCA claim
25 and held that jurisdiction was appropriate because his
26 claim that he did not receive a timely and correct
27 diagnosis "would not 'possibly have any effect on the
28 benefits [the veteran] has already been awarded.'" Id. at

1 1023 (quoting and citing *Littlejohn v. United States*, 321
2 F.3d 915, 921 (9th Cir. 2003)). VCS therefore recognized
3 that the FTCA "specifically confers jurisdiction on federal
4 district courts to hear" claims involving medical
5 negligence. *Id.* at 1023 n.13.

6
7 Sister circuits have reached similar conclusions. In
8 *Thomas v. Principi*, for instance, the D.C. Circuit held that
9 it had jurisdiction under the FTCA over the veteran's
10 claims that the VA negligently failed to inform the veteran
11 about his diagnosis. See 394 F.3d 970, 973-75, 364 U.S.
12 App. D.C. 326 (D.C. Cir. 2005). While acknowledging the
13 broad definition of "benefit" in § 511, the D.C. Circuit
14 rejected "any implication that all action or inaction by the
15 VA represents a type of 'service,' and therefore
16 automatically constitutes a 'benefit.'" *Id.* at 975. For
17 instance, "if a VA doctor left a sponge inside a patient
18 during surgery, section 511 would permit an FTCA
19 malpractice suit in district court." *Id.* By contrast, claims
20 that the VA "failed to render the appropriate medical
21 services" because it denied the veteran's request for
22 benefits "would require the district court 'to determine
23 first whether the VA acted properly' in providing [the
24 veteran] benefits." *Id.* (quoting *Price v. United States*, 228
25 F.3d 420, 422, 343 U.S. App. D.C. 302 (D.C. Cir. 2000)).
26 The D.C. Circuit ultimately concluded that the veteran's
27 negligence and malpractice claims did not raise any
28 "questions of law [or] fact necessary to a decision by the

1 Secretary under a law that affects the provision of
2 benefits" for purposes of § 511, and that the claims could
3 therefore proceed under the FTCA. Id. at 974-75
4 (alteration in original) (quoting 38 U.S.C. § 511); see also
5 *Anestis v. United States*, 749 F.3d 520, 524, 528 (6th Cir.
6 2014) (holding that a veteran could bring an FTCA claim
7 for medical malpractice against a VA intake clerk.
8

9 The Defendant falsely states in Motion to Dismiss that
10 Plaintiff's FAC had no culprit or "no healthcare
11 employee... alleged". The healthcare employee and/or
12 any other person in the employ thereof, in a facility of
13 and/or in the control of a governmental entity that is a
14 culprit is named as, "Defendant".
15

16 The Defendant states the factual allegations are "sparse"
17 that is only because the Defendant has stonewalled,
18 misrepresented facts, and blocked any attempt at
19 retrieving information on this matter. Multiple official
20 inquiry request have been made by the Plaintiff regarding
21 this matter with no response to date.
22

23 The plaintiff respectfully disagrees with all assertions
24 made by the Defendant and maintains that the FTCA
25 provides the appropriate avenue for the plaintiff's claims.
26 The plaintiff's allegations assert negligence, medical
27 negligence, and other tortious conduct on the part of the
28 defendant, which fall within the scope of the FTCA.

B. Causes of Action Alleged in the FAC are Proper Under the FTCA

The defendant argues that multiple causes of action alleged in the First Amended Complaint (FAC) are improper under the FTCA. However, the plaintiff respectfully asserts that the causes of action set forth in the FAC are well-founded and consistent with the FTCA. The plaintiff has alleged negligence, medical malpractice, and other tort claims arising from the defendant's actions or omissions, which are recognized under the FTCA.

The Defendant asserts that the Plaintiff's first cause of action "Violation of Due Process" is improper under the FTCA. Under California Tort law, an individual may bring a claim for violation of due process if they can establish the following elements: 1. Deprivation of a protected liberty or property interest: The plaintiff must demonstrate that they were deprived of a constitutionally protected interest, such as liberty or property, without proper procedural or substantive due process. 2. State action: The deprivation must be caused by a government entity or someone acting under the authority of the government. 3. Lack of adequate process: The plaintiff must show that they were not afforded the proper procedures or that the procedures followed were fundamentally unfair or unreasonable. 4. Damages: The

1 plaintiff must demonstrate that they suffered actual
2 damages as a result of the due process violation.

3
4 The Defendant argues that the second cause of action
5 "Breach of Contract" claim is not proper under the FTCA.
6 However, this claim does not solely rely on an alleged
7 government promise but asserts that the Defendant failed
8 to fulfill obligations that are inherent in the Plaintiff's
9 military service. The FTCA allows claims that arise from
10 the government's negligent or wrongful acts or omissions,
11 and the breach of contract claim squarely falls within this
12 category.

13
14 The Defendant argues that the fifth cause of action
15 "Fraud" claim is barred under 28 U.S.C. § 2680(h).
16 However, this provision refers to fraud or
17 misrepresentation by federal officers, which is
18 distinguishable from the Plaintiff's claim. The Plaintiff's
19 fraud claim is based on the alleged mishandling of service
20 records, not fraudulent acts by government officials.
21 Consequently, the fraud claim should not be precluded
22 under 28 U.S.C. § 2680(h). In addition California
23 recognizes the tort of fraud which is a form of civil
24 wrongdoing. The Plaintiff is able to bring a civil lawsuit
25 to seek damages for the harm caused by Plaintiff.

26
27
28

1 The Defendant asserts that the sixth cause of action
2 "Violation of The Privacy Act of 1974" claim is improper
3 under the FTCA, as it relies solely on federal law and fails
4 to establish a corresponding duty under state tort law.
5 However, The Privacy Act of 1974, 5 U.S.C. § 552a, does
6 create a duty to safeguard individuals' private information.
7 The Plaintiff's claim arises from alleged violations of
8 federal law and California State law which recognizes
9 several privacy-related torts, including public disclosure
10 of private facts these torts provide individuals with legal
11 remedies for privacy violations, allowing them to seek
12 damages for harm caused by the invasion of their privacy.

13
14 The Defendant argues that the eighth Cause of Action
15 "Negligent Hiring or Training" claim falls within the
16 discretionary function exception. While discretionary
17 functions are immune from suit under the FTCA, the
18 Plaintiff's claim is not based on discretionary decisions
19 but on alleged negligence in hiring and training
20 employees. The Ninth Circuit has consistently held that
21 claims of negligent hiring, training, and supervision are
22 not subject to the discretionary function exception.

23
24 If the court does find that one or more of the causes of
25 action are improper under the FTCA the Plaintiff
26 respectfully requested that the court recognizes the
27 validity of the remaining causes of actions. Dismissing
28 the entire case based solely on the non-cognizable causes

1 of actions would be premature and unjust, as it disregards
2 the valid and viable claims asserted by the Plaintiff.

3
4
5
6
7 **C. The Court Has Subject Matter Jurisdiction Despite**
8 **the Defendant's Time-Barred Argument.**

9
10 The defendant asserts that the court lacks subject matter
11 jurisdiction because the plaintiff's complaint is time-
12 barred. However, the plaintiff respectfully contends that
13 the claims are timely filed within the applicable statute of
14 limitations.

15
16 The date of injury is November 25, 2019. In *United States*
17 *v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L. ed. 2d 259
18 (1979) case the Supreme Court made it clear that there are
19 three areas of knowledge that are of critical significance
20 on the statute of limitations issue. They are 1) knowledge
21 of the existence of an injury; 2) knowledge of the cause of
22 the injury; and 3) knowledge of the legal significance of
23 the injury. the court made it clear that the accrual of a
24 cause of action does not depend on the third area of
25 knowledge (legal significance) but does depend on the
26 congruence of the first two (existence of injury and cause
27 of injury). Furthermore it is not enough to trigger the
28 statute of limitations that the claimant is aware of his

1 injury if he is unaware of the act or omission which
2 caused the injury. *De Witt v. United States*, 593 f. 2d 276
3 (7th cir. 1978); *Jordan v. United States*, 503 f.2d 620 (6th
4 cir. 1974). As of November 26, 2019, the Plaintiff became
5 aware of both the existence of an injury and most
6 importantly the cause of the injury which was the
7 Defendant's negligent act of losing the Plaintiff's service
8 department records.

9
10 In an attempt to evade the jurisdiction of this court, and,
11 the remedy the court has at its avail for the Plaintiff the
12 Defendant is intentionally giving false information to the
13 court by stating that the Plaintiff was informed that their
14 service department records had been lost in May 2010.
15 Nowhere in the Rating Decision letter dated May 14,
16 2010 Exhibit D was the Defendant honest and admit to
17 losing the Plaintiff's service department records. The
18 verbiage used was "No service medical records were
19 available for review. Efforts to obtain service medical
20 records from all potential sources were unsuccessful".
21 That could mean a myriad of things. The records could
22 have been unavailable for review...with all efforts to
23 obtain service medical records from all potential sources
24 as unsuccessful because of a computer malfunction, a fire
25 (which historically has happened), or cyber hacking/
26 warfare to name a few of the myriad of reasons that could
27 be applicable as to why the records were "unavailable".
28

1 In addition, the Defendant asserts that even if the court
2 finds that November 25, 2019 was in fact the correct tort
3 accrual date that Plaintiff claim is still time barred under
4 Section 2401(b).

5
6 The Plaintiff first brought this claim in front of the United
7 States District Court For the Central District of California
8 on March 15, 2022, case number 2:22-cv-08522-FWS-
9 PVC the case was dismissed without prejudice by your
10 Honor Judge Fred W. Slaughter due to lack of prosecution
11 for failure to comply with the courts order. Allowing the
12 Plaintiff to re-enter the complaint unchanged on
13 November 21, 2022.

14
15 In addition, the tortfeasor concealed their involvement in
16 the tort which allows for equitable tolling or the
17 suspension of the SOL. The defendant to this day actively
18 conceals their involvement in the tort, making it difficult
19 for the Plaintiff to discover the harm or identity the
20 responsible party. The elements necessary for equitable
21 tolling i.e. concealment, lack of knowledge, reasonable
22 diligence have been met.

23
24 Also, this claim does have a date of injury that is
25 continuous.

26
27 The plaintiff has initiated this action within the
28 prescribed time limit in relation to the date of injury, and

1 the defendant's argument regarding the expiration of the
2 statute of limitations is without merit.

3 4 5 6 **IV. Request For Leave To Amend**

7
8 In the event that this honorable court finds any
9 deficiencies in the First Amended Complaint, the plaintiff
10 respectfully requests leave to amend the complaint to cure
11 any such deficiencies. The FAC was submitted without
12 the Plaintiff having enough time to produce an amended
13 complaint that would ensure that all relevant claims and
14 causes of action are properly presented before the court
15 because the Plaintiff's former council had to be
16 terminated forty-eight hrs before the deadline for
17 submission of the FAC. The plaintiff believes that
18 amendment if necessary will serve the interests of justice
19 and will ensure that all relevant claims and causes of
20 action are properly presented before this court.

21 22 **V. CONCLUSION**

23
24 In conclusion, the plaintiff respectfully requests that this
25 honorable court denies the defendant's Motion to Dismiss
26 and allows this case to proceed on its merits in the interest
27 of justice and so that the Plaintiff may have redress for the
28 tortious conduct of the Defendant. Allowing the Plaintiff

1 their day in court. The Plaintiff's claims fall within the
2 subject matter jurisdiction of this court, the causes of
3 action alleged in the FAC are proper under the FTCA, and
4 the claims are not time-barred. Additionally, the plaintiff
5 seeks leave to amend the First Amended Complaint if
6 necessary.

7
8 WHEREFORE, the plaintiff respectfully requests that this
9 honorable court denies the defendant's Motion to Dismiss,
10 grants leave to amend the First Amended Complaint if the
11 court finds deficiencies, and grants such other and further
12 relief as deemed just and proper.

13
14 Respectfully submitted,

15
16 Donovan Foster, Pro Per
17 578 Washington Blvd
18 Marina Del Rey, CA 90292
19 fostermailbox@gmail.com
20 1-212-920-1477
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27
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EXHIBIT C

Donovan J Foster v United States of America

Standard Form 95

Case 2:22-cv-08522-FWS-PVC

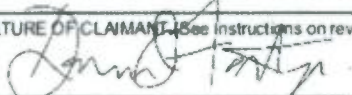
CLAIM FOR DAMAGE, INJURY, OR DEATH		INSTRUCTIONS: Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.		FORM APPROVED OMB NO. 1105-0008	
1. Submit to Appropriate Federal Agency: NATIONAL ARCHIVES AND RECORDS ADMINISTRATION AND DEPARTMENT OF VETERANS AFFAIRS			2. Name, address of claimant, and claimant's personal representative if any. (See instructions on reverse). Number, Street, City, State and Zip code. DONOVAN J. FOSTER JR. 578 WASHINGTON BLVD NUM 312 MARINA DEL REY, CA 90292		
3. TYPE OF EMPLOYMENT <input type="checkbox"/> MILITARY <input checked="" type="checkbox"/> CIVILIAN		4. DATE OF BIRTH 08/13/1985	5. MARITAL STATUS SINGLE	6. DATE AND DAY OF ACCIDENT 11/26/2019	
7. TIME (A.M. OR P.M.) 11:00PM					
8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary). MY SERVICE DEPARTMENT RECORDS WERE LOST OR MISLABELED THIS FLAGRANT NEGLIGENT ACT BY YOUR GOVERNMENTAL ENTITY OR BY SOMEONE IN THE EMPLOY THEREOF, IN A FACILITY OF AND OR IN THE CONTROL OF YOUR GOVERNMENTAL ENTITY HAS CAUSED INFINITE ENDLESS HARM AND OR PERSONAL INJURY TO MYSELF THE CLAIMANT. PLEASE SEE ATTACHED DEMAND LETTER FOR FURTHER DETAIL.					
9. PROPERTY DAMAGE					
NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code). NONE					
BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED. (See instructions on reverse side). NONE					
10. PERSONAL INJURY/WRONGFUL DEATH					
STATE THE NATURE AND EXTENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJURED PERSON OR DECEDENT. MY SERVICE DEPARTMENT RECORDS WERE LOST OR MISLABELED. THIS FLAGRANT NEGLIGENT ACT BY YOUR GOVERNMENTAL ENTITY HAS CAUSED PERMANENT DEBILITATING INJURY AND POST TRAMATIC STRESS DISORDER.					
11. WITNESSES					
NAME			ADDRESS (Number, Street, City, State, and Zip Code)		
TO BE DETERMINED IN PRE-TRIAL DISCOVERY IF APPLICABLE			TO BE DETERMINED IN PRE-TRIAL DISCOVERY IF APPLICABLE		
12. (See instructions on reverse). AMOUNT OF CLAIM (in dollars)					
12a. PROPERTY DAMAGE NONE		12b. PERSONAL INJURY \$92,288,776,984.00		12c. WRONGFUL DEATH \$92,288,776,984.00	
12d. TOTAL (Failure to specify may cause forfeiture of your rights). \$92,288,776,984.00					
I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM.					
13a. SIGNATURE OF CLAIMANT (See instructions on reverse side). 			13b. PHONE NUMBER OF PERSON SIGNING FORM 2129201477		14. DATE OF SIGNATURE 10/13/2020
CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM The claimant is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages sustained by the Government. (See 31 U.S.C. 3729).			CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS Fine, imprisonment, or both. (See 18 U.S.C. 287, 1001.)		

EXHIBIT D

Donovan J Foster v United States of America
Case 2:22-cv-08522-FWS-PVC



**DEPARTMENT OF VETERANS AFFAIRS
Hartford Regional Office
P.O. Box 310909
Newington, CT 06131-0909**

DONOVAN FOSTER

**VA File Number
600 80 1521**

**Rating Decision
May 14, 2010**

INTRODUCTION

The records reflect that you are a veteran of the Gulf War Era. You served in the Army from October 10, 2007 to July 23, 2008. You filed an original disability claim that was received on October 6, 2009. Based on a review of the evidence listed below, we have made the following decisions on your claim. No service medical records were available for review. Efforts to obtain service medical records from all potential sources were unsuccessful. If these records are located at a later date, this decision will be reconsidered.

DECISION

- 1 . Service connection for missing part of the pointer finger is denied.
- 2 . Service connection for back condition is denied.
- 3 . Service connection for depression is denied.

DONOVAN FOSTER
600 80 1521
Page 2

EVIDENCE

- VA Form 21-526 Application for Compensation and/or Pension Benefits received on October 6, 2009
- Duty to assist letter dated November 10, 2009
- Letter to you dated December 10, 2009
- Report of general information dated December 21, 2009
- Letter to you dated January 20, 2010
- Letter to you dated March 3, 2010
- Report of general information dated April 14, 2010
- Report of general information dated April 19, 2010
- Report of general information dated April 28, 2010
- Letter to you dated May 3, 2010

REASONS FOR DECISION

1. Service connection for missing part of the pointer finger.

A claim for service connection requires evidence of a current disability, evidence of incurrence or aggravation of a disease or injury in service, and evidence of a nexus or link, between the in-service injury or disease and the current disability. Service connection may also be granted for a disease or injury which resulted from a service-connected disability or was aggravated thereby. No service medical records were available for review. Efforts to obtain service medical records from all potential sources were unsuccessful. If these records are located at a later date, this decision will be reconsidered. Service connection for missing part of the pointer finger is denied since this condition neither occurred in nor was caused by service.

On the duty to assist letter dated January 20, 2010 we indicated that we needed evidence that established that the missing part of the pointer finger existed from the time of military service to the present. To date, we have not received any evidence which establishes that the missing part of the pointer finger existed from military service to the present. Without such evidence we are unable to establish service connection. Therefore, your claim for service connection for missing part of the pointer finger is denied.

2. Service connection for back condition.

A claim for service connection requires evidence of a current disability, evidence of incurrence or aggravation of a disease or injury in service, and evidence of a nexus or link, between the in-service injury or disease and the current disability. Service connection may also be granted for a disease or injury which resulted from a service-connected disability or was aggravated thereby. No service medical records were available for review. Efforts to obtain service medical records from all potential sources were unsuccessful. If these records are located at a later date, this

DONOVAN FOSTER
600 80 1521
Page 3

decision will be reconsidered. Service connection for missing part of the pointer finger is denied since this condition neither occurred in nor was caused by service.

On the duty to assist letter dated January 20, 2010 we indicated that we needed evidence that established that the back condition existed from the time of military service to the present. To date, we have not received any evidence which establishes a current back condition and a link between the back condition and your time in military service. Without such evidence we are unable to establish service connection. Therefore, your claim for service connection for a back condition is denied.

3. Service connection for depression as secondary to missing part of the pointer finger.

Service connection may be granted for a disease or injury which resulted from a service-connected disability or was aggravated thereby. The evidence does not show that missing part of the pointer finger is related to service. Therefore, service-connection for depression on a secondary basis to this condition cannot be established. There is also no evidence showing depression was incurred in or aggravated by military service.

On the duty to assist letter dated January 20, 2010 we indicated that we needed evidence that established that depression existed from military service to the present time or a link between the depression and your missing part of the pointer finger. To date, we have not received any evidence which establishes a current diagnosis of depression and a link between the depression and the missing part of the pointer finger. Without such evidence we are unable to establish service connection. Therefore, your claim for service connection for depression is denied.

REFERENCES:

Title 38 of the Code of Federal Regulations, Pensions, Bonuses and Veterans' Relief contains the regulations of the Department of Veterans Affairs which govern entitlement to all veteran benefits. For additional information regarding applicable laws and regulations, please consult your local library, or visit us at our web site, www.va.gov.